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Recent Developments in Alcoholic Beverage Labeling Regulation

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Class of 2011
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This paper is submitted in satisfaction of the course requirement.

Abstract

In light of the ubiquitous “Nutrition Facts” labels that appear on food products and non-alcoholic beverages, it is surprising to some people that there is not a standard label on alcoholic beverages containing information about alcohol and nutritional content. In 2007, the Alcohol and Tobacco Tax and Trade Bureau (“TTB”)—the federal agency within the Department of the Treasury tasked with regulating alcoholic beverages—issued a notice of proposed rulemaking to require alcohol and nutritional content to appear on alcoholic beverage labels. Extensive public comments were submitted on the proposed rule, and more than three years have passed, but it is unclear if and when the TTB will issue a final rule. This note describes the recent history of TTB’s efforts to close this “regulatory gap” with respect to alcoholic beverage labeling. Additionally, this note explores the unique balance of state and federal authority with respect to alcoholic beverage labeling, and how a more detailed federal label mandate may affect this balance. Special attention is paid to whether a federal label would “pre-empt” state label regulations.

Introduction

Compared to food products and non-alcoholic beverages, both of which are generally required by federal regulations to carry well-known “Nutrition Facts” labels,¹ alcoholic beverage labels provide limited and inconsistent information on alcohol and nutritional content to consumers.² For the most part, under federal regulations, alcohol content is only required to appear on wines stronger than 14% alcohol by volume (“ABV”), on distilled spirits, and on “flavored” malt beverages.³ Some states require additional information, but many states do not.⁴ In 2007, the Alcohol and Tobacco Tax and Trade Bureau (“TTB”)—the federal agency tasked with regulating alcoholic beverages—issued a notice of proposed rulemaking to fill this regulatory gap. If and when the TTB issues a final rule requiring a uniform label to appear on alcoholic beverages, an open question is how such a federal mandate would affect the balance of state and federal authority over alcoholic beverage labeling. That question is explored throughout the note, with special attention paid to whether a federal label mandate would pre-empt state label regulations. The note proceeds as follow:

Part I summarizes current federal regulations for wine, liquor and beer labels and briefly discusses the history of various federal attempts to require nutritional and alcohol

¹ See The Nutrition Labeling and Education Act of 1990, Pub. L. No. 101-535, § 6(c), 104 Stat. 2535 (1990) (codified in scattered sections of 21 U.S.C. § 343); *see also* 21 C.F.R. § 101.9 (FDA’s implementing regulations).

² Besides alcohol and nutritional content, there are other areas where alcoholic beverage labeling falls short of non-alcoholic beverage labeling and food product labeling. For example, there is a long history regarding allergen and ingredient labeling for alcoholic beverages. This note focuses on alcohol and nutritional content, as these two areas are the current focus of TTB regulatory efforts.

³ There are exceptions to this statement. *See* notes 32–48 and accompanying text, *infra*, for more detail on the current federal regulations regarding mandatory disclosure of alcohol content on alcoholic beverages.

⁴ *See* notes 157–163 and accompanying text, *infra*, for examples of state requirements for alcoholic beverage labels.

content information to appear on alcoholic beverage labels. Particular attention is paid to the latest chapter of this history: TTB's 2007 Notice of Proposed Rulemaking regarding nutritional and alcohol content labeling. Recently, there have been renewed calls for TTB to issue a final rule on the matter, but some do not expect a final rule anytime soon. Further complicating the TTB's task in issuing a final rule is the recent healthcare reform bill, passed in March of 2010,⁵ which requires the FDA to write regulations requiring certain restaurants to disclose the calorie content of menu items, potentially including alcoholic beverages on such menus.⁶ The FDA and the TTB will likely be required to coordinate their rulemakings with respect to alcoholic beverage labeling.

Part II explores the question of how a federal label mandate may affect the balance of state and federal authority regarding regulation of alcoholic beverage labels. Historically, the states have played a relatively strong role in regulating alcoholic beverages, and the 21st Amendment to the U.S. Constitution solidified the states' role in regulating alcoholic beverages more generally. Indeed, many states impose their own (often contradictory) labeling requirements on alcoholic beverages in addition to the federal requirements, and existing federal regulations explicitly provide for concurrent state label regulations. To introduce the pre-emption question, I discuss several specific examples of overlapping state and federal authority over alcoholic beverage labeling. I conclude by discussing, at length, a very interesting 2004 opinion of the California Supreme Court in *Bronco Wine Co. v. Jolly* on TTB pre-emption, probably the leading case on the subject.

⁵ Patient Protection and Affordable Care Act of 2010, Pub. L. 111-148, 124 Stat. 119 (2010).

⁶ *Id.* § 4205.

I. TTB's Regulatory Authority and Summary of Current TTB Label Regulations

A. The FAA Act, BATF, and TTB

The source of TTB's authority over alcoholic beverage labels can be traced back to a statute passed just after the repeal of prohibition, the 1935 Federal Alcohol Administration Act ("FAA Act").⁷ The FAA Act had two main purposes: (1) to prevent consumer "deception" and (2) to provide consumers with "adequate information" as to the identity and quality of alcoholic beverage products.⁸ The FAA Act gave the Secretary of the Treasury the authority to issue regulations to accomplish those two aims.⁹ Before 2002, TTB's functions were carried out by the Bureau of Alcohol, Tobacco and Firearms in the Department of the Treasury ("BATF"), but the Homeland Security Act of 2002 shifted certain law enforcement responsibilities of BATF to the Department of Justice and kept tax and trade regulation within TTB, a new unit within the Treasury Department.¹⁰ The essential features of the FAA Act still exist today, largely without amendments, and remain the basis for TTB's authority to regulate alcoholic beverages.

B. Current TTB Regulations Regarding Alcoholic Beverage Labels

Section 105(e) and 105(f) of the FAA Act, codified at 27 U.S.C. § 205(e) and § 205(f), provide standards for the regulation and labeling of alcoholic beverages.¹¹ The implementing regulations, which appear at parts 4, 5, and 7 in title 27 of the Code of

⁷ Pub. L. No. 74-401 (Aug. 29, 1935), 49 Stat. 977.

⁸ 27 U.S.C. § 205(e) (1935).

⁹ *Id.*

¹⁰ See Peter Barton Hutt, Richard A. Merrill, Lewis Grossman, *FOOD AND DRUG LAW: CASES AND MATERIALS* 36 (2007, Foundation Press, 3d ed.); see also 68 Fed. Reg. 3,584, 3,744 (Jan. 24, 2003) (creating TTB as a separate bureau).

¹¹ See also 70 Fed. Reg. 22,275.

Federal Regulations, explicitly state what information is *required* on labels, what information is *prohibited* on labels, and what information *may appear* on labels.¹²

1. Basic Role of TTB and COLA process

i. Scope of TTB's Authority to Regulate Alcoholic Beverages

TTB is tasked with, among other things, regulating the labels of most alcoholic beverages in the U.S., specifically including wines,¹³ distilled spirits,¹⁴ and malt beverages.¹⁵ In some ways, the universe of alcoholic beverages falling within TTB's jurisdiction is not intuitive, but rather reflects a long history of shared regulatory authority with the FDA.¹⁶ For example, wines weaker than 7% ABV fall under FDA authority, but wines that are 7% ABV or stronger fall under the TTB's authority.¹⁷ Also, TTB recently ruled that some beers made from substitutes for malted barley (such as rice, wheat, or sorghum), or that do not contain hops, do not meet the definition of "malt beverages" under the FAA Act, and therefore are not subject to TTB labeling regulations

¹² See 27 C.F.R. Parts 4, 5, and 7.

¹³ See 27 U.S.C. § 205 and 27 C.F.R. Part 4.

¹⁴ See 27 U.S.C. § 205 and 27 C.F.R. Part 5.

¹⁵ See 27 U.S.C. § 205 and 27 C.F.R. Part 7.

¹⁶ For a fuller historical account of the shared regulatory authority between the FDA and the TTB over alcoholic beverages, see, e.g., Iver P. Cooper, *The FDA, the BATF, and Liquor Labeling: A Case Study of Interagency Jurisdictional Conflict*, 34 FOOD DRUG COSM. L.J. 370 (1979); see also Elaine T. Byszewski, *What's in the Wine? A History of the FDA's Role*, 57 FOOD & DRUG L.J. 545 (2002); see also Judson O. Berkey, *The History of Alcoholic Beverage Labeling Regulation and Its Implications for a Health Claim on Wine Labels*, FOOD AND DRUG LAW: AN ELECTRONIC BOOK OF STUDENT PAPERS (1998), available at http://www.law.harvard.edu/faculty/hutt/book_index.html.

¹⁷ See FDA Compliance Policy Guide No. 7101.05 (Oct. 1, 1980).

promulgated under the FAA Act.¹⁸ Instead, like wines weaker than 7% ABV, such beverages are exclusively subject to FDA regulations regarding labeling requirements.¹⁹

Similarly, even for alcoholic beverages that otherwise fall under TTB's regulatory authority, the FDA retains responsibility to evaluate the safety of ingredients added to such beverages.²⁰ Accordingly, in the recent Four Loko controversy,²¹ the FDA took the lead role in investigating whether the caffeine added to alcoholic beverages was an "unsafe food additive."²² For its part, the TTB coordinated its response with the FDA by issuing a warning to several producers of caffeinated alcoholic beverages stating that, if the FDA deemed their products "adulterated," then the TTB would consider those products mislabeled under the FAA Act and they could not be shipped or sold in interstate commerce.²³

In any event, although the precise scope of TTB's regulatory authority over alcoholic beverages is beyond the scope of this note, suffice it to say that, for the most part, TTB classifies alcoholic beverages into three categories: malt beverages, distilled

¹⁸ See TTB Ruling 2008-3, Classification of Brewed Products as 'Beer' Under the Internal Revenue Code of 1986 and as "Malt Beverages" Under the Federal Alcohol Administration Act (July 7, 2008); see also FDA Draft Guidance, Labeling of Certain Beers Subject to the Labeling Jurisdiction of the Food and Drug Administration (August 2009).

¹⁹ *Id.*

²⁰ See, e.g., Memorandum of Understanding Between the Food and Drug Administration and the Bureau of Alcohol, Tobacco and Firearms (Nov. 20, 1987).

²¹ Four Loko was a caffeinated alcoholic beverage from which several college students became severely intoxicated in late 2010. See, e.g., M. Amedeo Tumolillo, *Company to Drop Caffeine From Alcoholic Drinks*, THE NEW YORK TIMES, Nov. 16, 2010.

²² See FDA News Release, FDA Warning Letters issued to four makers of caffeinated alcoholic beverages (Nov. 17, 2010), available at <http://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/ucm234109.htm>.

²³ See TTB Press Release, Alcohol Beverages with Added Caffeine (Nov. 23, 2010), available at http://www.ttb.gov/main_pages/caffeine-added.shtml.

spirits, and wines, and that each of those categories roughly overlaps with the common understanding of those beverage types.

ii. TTB's Label Pre-Approval Process

The FAA Act and the implementing TTB regulations require that alcoholic beverage producers submit proposed beverage labels to TTB *before* bottling, packaging, selling, or shipping alcoholic beverages.²⁴ Once the TTB receives a label application, it evaluates the label to ensure that it complies with all applicable TTB label requirements, and if the label meets those requirements, the TTB issues a “Certificate of Label Approval” (“COLA”) to the applicant.²⁵ The issuance, denial, and revocation of COLAs is highly regulated by TTB, and there are very specific procedures for label applications, as well as a formal appeals processes.²⁶ And, there are very different labeling requirements depending on whether TTB considers the particular beverage to be a malt beverage, a distilled spirit, or a wine.²⁷

2. Required Disclosures for All Alcoholic Beverage Labels

Currently, TTB *requires* that seven pieces of information be displayed on all alcoholic beverages, whether a malt beverage, distilled spirit, or wine: (1) brand name, (2) the identity of the product, (3) the name and address of either the bottler, packer, or importer, (4) net contents, (5) the presence of sulfites and FD&C Yellow 5,137 and (6) a

²⁴ See 27 U.S.C. § 205(e) and (f) (vesting authority in the Secretary of the Treasury to prescribe regulations with respect to the labeling and advertising of wine, distilled spirits, and malt beverages, and providing that no person may bottle such beverages unless he has obtained a certificate of label approval issued in accordance with regulations prescribed by the Secretary); *see also* 27 C.F.R. § 4.50 (TTB's COLA regulations regarding wine), § 5.50 (TTB's COLA regulations regarding distilled spirits), §7.41 (TTB's COLA regulations regarding malt beverages).

²⁵ *Id.*

²⁶ See 27 C.F.R. §§ 13.1–13.92 (“Label Proceedings”).

²⁷ Compare 27 C.F.R. §§ 4 (wine), 5 (distilled spirits), and 7 (malt beverages).

Government Warning.²⁸ The Government Warning requirement was introduced by the Alcoholic Beverage Labeling Act of 1988 (“ABLA”), and it became effective in November of 1989.²⁹ The Government Warning informs the public about the health risks associated with alcohol consumption.³⁰ For the most part, the remaining TTB regulations regarding alcoholic beverage labels depend on whether the beverage is a malt beverage, distilled spirit, or wine.³¹

3. Label Requirements for Malt Beverages, Spirits, and Wines

With the exception of *flavored* malt beverages,³² malt beverages are not required to disclose alcohol content on labels.³³ That said, TTB *permits* malt beverage labels to include alcohol content, unless such disclosure is prohibited by state law.³⁴ When alcohol

²⁸ 27 C.F.R. §§ 4.32, 5.32, 7.22. *See also* Brian Simas, *Is it Time for Nutrition Facts to Hit the Bottle: Nutrition Labeling of Alcoholic Beverages and the Implications for Consumers and the Industry*, Unpublished Paper (2008-2009), *available at* <http://kirksimas.com/Library/PDF%20Files/Ag%20-%20Wine%20Practice%20Group%20Files/Alcohol%20Labeling%20Comment.pdf>.

²⁹ 27 U.S.C. §§ 213–219(a).

³⁰ Specifically, the Government Warning states the following: “GOVERNMENT WARNING: (1) According to the Surgeon general, women should not drink alcoholic beverages during pregnancy because of the risk of birth defects. (2) Consumption of alcoholic beverages impairs your ability to drive a car or operate machinery, and may cause health problems.” *Id.* at § 215.

³¹ To reiterate, the items listed in this paragraph are the only items *required* to be placed on every beverage label, regardless of whether it is for a malt beverage, a wine, or a distilled spirit. Separately, there is a variety of information that the TTB *allows* producers to include on labels for malt beverages, wines, and distilled spirits. For example, truthful claims about calorie and carbohydrate claims are allowed on all labels, as long as such claims are accompanied by statements of average analysis (which disclose calorie, carbohydrate, protein and fat content). *See* Caloric and Carbohydrate Representations in the Labeling and Advertising of Wine, Distilled Spirits and Malt Beverages at 5–6, TTB Ruling 2004-1, *available at* <http://www.ttb.gov/rulings/2004-1.pdf>.

³² *See* 27 C.F.R. § 7.22 (mandating disclosure of alcohol content for malt beverages that contain “any alcohol derived from added flavors or other added nonbeverage ingredients (other than hops extract) containing alcohol”).

³³ 27 C.F.R. § 7.22; 7.71.

³⁴ 27 C.F.R. § 7.71. Note that a provision of the FAA Act *prohibited* malt beverages from listing alcohol content (unless required by state law), out of a fear that manufacturers would engage in “strength wars” by creating stronger and stronger beers to compete against each other. In *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995), however, this provision of FAA was held to violate the First Amendment, and therefore

content appears on a malt beverage label, it has to be in the ABV form.³⁵ For malt beverages labeled as “low alcohol,” the alcohol content has to be 2.5% ABV or lower.³⁶

Malt beverages that are labeled “light” or “lite” are *required* to include a “statement of average analysis,” which must disclose calorie, carbohydrate, protein and fat content.³⁷ Similarly, caloric and carbohydrate claims are *permitted* on malt beverage labels not labeled “light” or “lite,” but only if they are accompanied by a statement of average analysis.³⁸ A recent news article noted that one brewer was asked by TTB to remove calorie counts from its website because it did not offer the full range of nutritional information required on statements of average analysis.³⁹

TTB labeling regulations for distilled spirits are somewhat unique in that all distilled spirits are *required* to include information about alcohol content (in the ABV form) on the brand label.⁴⁰ Disclosure of alcohol “proof” is optional, but if proof does

malt beverage producers may now disclose alcohol content on their labels. Many malt beverages producers, however, opt not to include alcohol content information. *See also* Adolph Coors Co. v. Brady, 944 F.2d 1543, 1548 (10th Cir.1991) (noting legislative history of FAA, including testimony “that labels displaying alcohol content resulted in a strength war wherein producers competed for market share by putting increasing amounts of alcohol in their beer.”); Madolph Coors Co. v. Bentsen, 2 F.3d 355, 358 (10th Cir. 1993) (explaining that information on alcohol content was properly considered commercial speech under a four part test elaborated by Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, 447 U.S. 557 (1980), and that the government’s countervailing interest of preventing strength wars, although “legitimate and [] within its regulatory authority,” was not advanced by the prohibition “in a direct and material way”).

³⁵ 27 C.F.R. § 7.71.

³⁶ *Id.*

³⁷ *See, e.g.*, TTB Ruling 2004-1 at 11 (“It should be noted that it has long been our policy to allow the use of the term ‘light’ or ‘lite’ on malt beverage labels, as long as the product was labeled with a statement of average analysis.”); *see also* ATF Ruling 79-17 and ATF Ruling 80-3 (both requiring statements of average analysis when the term “light” or “lite” is used on the malt beverage label).

³⁸ *See, e.g.*, TTB Ruling 2004-1 at 3 and ATF Ruling 80-3 at 1.

³⁹ Greg Kitsock, *Who cares about calories?*, THE WASHINGTON POST, June 30, 2010.

⁴⁰ 27 C.F.R § 5.32(a)(3), § 5.37.

appear on a label, it must appear in conjunction with the ABV disclosure.⁴¹ Also, compared to its approach toward malt beverages and wines, TTB has very detailed regulations regarding standards of identity for distilled spirits. For example, TTB regulations stipulate in detail what is required to label a whisky a “bourbon whisky” or a “corn whisky.”⁴² Finally, caloric and carbohydrate claims are permitted on distilled spirits labels, but only if they are accompanied by a statement of average analysis.⁴³

With respect to wine, it should be reiterated that the FDA, rather than TTB, regulates labels for wines weaker than 7% ABV.⁴⁴ Thus, wines weaker than 7% are required to include Nutrition Facts labels.⁴⁵ TTB regulations state that wines that are between 7% and 14% ABV may either designate themselves “table wine” or “light” wine, or they may simply list alcohol content.⁴⁶ But, wines that are 14% ABV or stronger are *required* to disclose alcohol content, and only in the familiar ABV form.⁴⁷ Finally, like malt beverages and distilled spirits, caloric and carbohydrate claims are permitted on wine labels, but only if they are accompanied by a statement of average analysis.⁴⁸

⁴¹ 27 C.F.R. § 5.37(a)(2).

⁴² 27 C.F.R. § 5.22 (*bourbon* whisky “is whisky produced at not exceeding 160° proof from a fermented mash of not less than 51 percent corn, rye, wheat, malted barley, or malted rye grain, respectively, and stored at not more than 125° proof in charred new oak containers; and also includes mixtures of such whiskies of the same type” and *corn* whisky “is whisky produced at not exceeding 160° proof from a fermented mash of not less than 80 percent corn grain, and if stored in oak containers stored at not more than 125° proof in used or uncharred new oak containers and not subjected in any manner to treatment with charred wood; and also includes mixtures of such whisky”).

⁴³ See note 37, *supra*.

⁴⁴ See note 17 and accompanying text, *supra*.

⁴⁵ *Id.*

⁴⁶ 27 C.F.R. § 4.32, § 4.36.

⁴⁷ *Id.*

C. History of BATF / TTB Efforts to Require More Information on Labels

Historically, the FDA did not require alcoholic beverage labels to comply with the FDA's own labeling requirements, but in the early 1970's, the FDA pressured BATF to require more detailed regulations for ingredient labeling on alcoholic beverages.⁴⁹ In response to BATF resistance, the FDA announced that it would require alcoholic beverages to conform with the labeling requirements of the Food, Drug and Cosmetics Act.⁵⁰ The FDA's position was rejected in *Brown-Forman Distillers Corp. v Mathews*,⁵¹ but in the 1970s and 1980s, the BATF itself considered but ultimately rejected requiring ingredient labeling on alcoholic beverages.⁵² During that period, BATF explained that its decision was based on a cost-benefit analysis, as well as international competitiveness reasons.⁵³ Despite various legal challenges to BATF's regulatory forbearance,⁵⁴ the only ingredients that BATF required to be disclosed were Yellow No. 5⁵⁵ and sulfites,⁵⁶ and

⁴⁸ See TTB Ruling 2004-1 at 5-6 ("[W]e are clarifying that wines, distilled spirits, and malt beverages may be labeled with truthful and factual caloric or carbohydrate statements, as long as the label also contains a statement of average analysis in accordance with this ruling.").

⁴⁹ See Hutt, *supra* note 10, at 136-37.

⁵⁰ 40 Fed Reg. 54,455 (Nov. 24, 1975).

⁵¹ 435 F.Supp. 5 (W.D. Ky. 1976).

⁵² See Hutt, *supra* note 10, at 37; see also Rescission of Ingredient Labeling Regulations for Wine, Distilled Spirits, and Malt Beverages, 46 Fed. Reg. 55,093 (Nov. 6, 1981). For a fuller historical account of BATF and TTB efforts to require nutritional and ingredient labeling on alcoholic beverages, see also Byszewski, *supra* note 16; see also Brian Simas, *supra* note 28; see also Berkey, *supra* note 16.

⁵³ See, e.g., Ingredient Labeling of Malt Beverages, Distilled Spirits, and Wine, 40 Fed. Reg. 52,613 (Nov. 11, 1975); Rescission of Ingredient Labeling Regulations for Wine, Distilled Spirits, and Malt Beverages, 46 Fed. Reg. 55,093 (Nov. 6, 1981); see also Simas, *supra* note 28, at 8 (describing history of BATF's efforts to mandate ingredient and nutritional labeling).

⁵⁴ See, e.g., Ctr. for Science in the Pub. Interest v. Dep't of the Treasury, 797 F.2d 995 (D.C. Cir. 1986) (reversing district court's holding that BATF had failed to provide a reasoned explanation for its refusal to mandate ingredient labeling).

⁵⁵ 48 Fed. Reg. 45,549 (Oct. 6, 1983).

there were not any successful regulatory efforts to require nutritional or alcohol content labeling.

In 1993, BATF issued an advance notice of proposed rulemaking to determine whether FDA's nutritional labeling requirements should be applied to alcoholic beverages, but did not take further action on the matter.⁵⁷ There were few significant developments in alcoholic beverage labeling reform until 2003, when the Center for Science in the Public Interest (CSPI), the National Consumers League (NCL), 67 other organizations, and eight individuals petitioned TTB to require more detailed alcoholic beverage labeling ("CSPI Petition").⁵⁸ The CSPI petition called for disclosure of, among other things, alcohol content, calorie content, drinks per container, and standard drink size, in an "Alcohol Facts" panel.⁵⁹ In arguing that the public was widely supportive of mandatory disclosure, the CSPI petition stated that 94 percent of consumers surveyed supported mandatory alcohol content labeling.⁶⁰

After TTB received the CSPI petition, the agency also received requests from alcoholic beverage producers seeking to label products with similar information.⁶¹ In 2004, TTB reached out to market participants and others seeking comments on a voluntary "Serving Facts" panel, and published several example icons for such a panel,

⁵⁶ 50 Fed. Reg. 26,001 (June 24, 1985).

⁵⁷ See Hutt, *supra* note 10, at 137; see also 58 Fed. Reg. 42,517 (Aug. 10, 1993).

⁵⁸ See 72 Fed. Reg. 41,860–61. The CSPI Petition is available at <http://www.cspinet.org/booze/03121IngLabelingPetition.pdf>.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

all of which included information on calories and alcohol content.⁶² After receiving comments on a Serving Facts panel,⁶³ TTB issued a press release indicating that it would proceed on the issue through an advance notice of proposed rulemaking, as opposed to a TTB ruling.⁶⁴

In 2005, TTB published that advance notice of proposed rulemaking (“ANPR 41”), addressing a host of alcoholic beverage labeling questions.⁶⁵ ANPR 41 clearly laid out the history of TTB and BATF’s efforts to require disclosure of alcohol content and nutritional information on alcoholic beverage labels,⁶⁶ and solicited public comments on “appropriate ways to use alcoholic beverage labels to inform the public about the identity and quality of the products.”⁶⁷ Specifically, TTB sought comments on the desirability and feasibility of “Alcohol Facts”⁶⁸ and “Serving Facts”⁶⁹ labels, including ingredient and

⁶² *Id.* at 41,862.

⁶³ These comments reflected a range of views, and many comments suggested that TTB proceed through notice and comment rulemaking, rather than a TTB ruling. Some comments indicated that some elements of a Serving Facts label would tend to confuse or mislead consumers. *See* 72 Fed. Reg. 41,862.

⁶⁴ *See* 72 Fed. Reg. 41,862.

⁶⁵ Labeling and Advertising of Wines, Distilled Spirits and Malt Beverages; Request for Public Comment, 70 Fed. Reg. 22,274 (proposed Apr. 29, 2005); *see also* Simas, *supra* note 28 (describing history of TTB efforts to require further disclosures on alcoholic beverage labels).

⁶⁶ *Id.* at 22,276–22,278.

⁶⁷ *Id.* at 22,275.

⁶⁸ *Id.* at 22,280 (the Alcohol Facts panel was suggested by the 2003 CSPI petition, and included: servings per container, serving size, calories per serving, alcohol by volume (%), alcohol per serving (oz.), ingredients, and the following statement: “U.S. Dietary Guidelines advice on moderate drinking: no more than two drinks per day for men, one drink per day for women.”) *See id.* at 22,279.

⁶⁹ *Id.* at 22,282. The example Serving Facts panels published by TTB were somewhat different than the Alcohol Facts panel suggested in 2003 by CSPI. TTB’s example Serving Facts panels generally included: servings per container, serving size, calories per serving, alcohol per serving (oz.), fat per serving (g), carbohydrates per serving (g), and protein per serving (g). Some example Serving Facts labels also defined a “standard drink” as containing .6 fluid ounces of alcohol, stated how many “standard drinks” there were in one “serving,” and included an illustration suggesting that a standard 1.5 oz spirit, a 5 oz glass of wine, and a 12 oz glass of beer each contained .6 fluid ounces of alcohol. *See id.* at 22,281.

alcohol content, for all alcoholic beverages under TTB's regulatory authority. ANPR 41 received over 19,000 comments from consumers, consumer advocacy groups, government officials, alcoholic beverage industry members and associations, health organizations, and other concerned individuals.⁷⁰ TTB's next major regulatory action came in 2007, when it issued Notice of Proposed Rulemaking No. 73 ("NPR 73").⁷¹

D. NPR 73

1. Overview of NPR 73

NPR 73 proposed to require an alcohol content statement on all alcoholic beverage labels, expressed as a percentage of alcohol by volume ("ABV").⁷² NPR 73 also proposed to require alcoholic beverages to contain a nutrient information panel (TTB suggested that this panel be labeled a "Serving Facts" panel, which one might think of as analogous to the "Nutrition Facts" panel on food labels⁷³) listing reference serving sizes,⁷⁴ servings per container, calories, carbohydrates, protein and fat.⁷⁵ TTB also

⁷⁰ See 72 Fed. Reg. 41,863.

⁷¹ Labeling and Advertising of Wines, Distilled Spirits and Malt Beverages, 72 Fed. Reg. 41,860 (proposed July 31, 2007) ("NPR 73").

⁷² *Id.* at 41,873. The statement of alcohol content by volume could either appear on the "Serving Facts" label or elsewhere on the label. *Id.*

⁷³ See The Nutrition Labeling and Education Act of 1990, Pub. L. No. 101-535, § 6(c), 104 Stat. 2535 (1990) (codified in scattered sections of 21 U.S.C. § 343); see also 21 C.F.R. § 101.9 (FDA's implementing regulations).

⁷⁴ The reference serving sizes that TTB proposed were: (a) for wine below 14% ABV, 5 fluid ounces; (b) for wine of 14% ABV or more, 2.5 fluid ounces; (c) for distilled spirits below 10% ABV, 12 fluid ounces; (d) for distilled spirits from 10% ABV to 18% ABV, 5 fluid ounces; (e) for distilled spirits of 18% ABV or more, 1.5 fluid ounces; (f) for malt beverages less than 10% ABV, 12 fluid ounces; (g) for malt beverages of 10% ABV or more, 5 fluid ounces. See 72 Fed. Reg. 41,873–41,874. According to TTB, these amounts for various beverage categories "closely approximate[d] the amount of the product that a consumer customarily drinks as a single serving. [These amounts are] specified as a reference amount used only as a basis for the consumer to determine nutrient and calorie intake and not as a recommended consumption amount. These rules are intended to ensure as much uniformity as possible in labeling serving sizes within a product category." See *id.* at 41,873.

proposed an *optional* statement of alcohol content expressed in U.S. fluid ounces per serving—in addition to the *mandatory* ABV alcohol content disclosure.⁷⁶ A proposed Serving Facts panel (including the optional disclosure of alcohol content expressed as fluid ounces, and placing the ABV disclosure on the Serving Facts panel itself, rather than elsewhere on the label, as was proposed to be allowed) follows:

Serving Facts	
Serving Size	5 fl oz (148 ml)
Servings Per Container	5
Amount Per Serving	
Alcohol by volume	14%
fl oz of alcohol	0.7
Calories	120
Carbohydrate	3g
Fat	0g
Protein	0g

The comment period for NPR 73 was originally scheduled to end on October 29, 2007, but it was extended through January 27, 2008.⁷⁷ Over eight hundred public comments were submitted in response to NPR 73.⁷⁸ These comments expressed a range of views on whether mandatory disclosure of alcohol and nutritional content is necessary, and in any event, whether the form that TTB suggested in NPR 73 was the best way to present that information.

2. Public Comments and Central Controversies

Some of the largest and most prominent trade groups representing the beer, spirits, and wine industries submitted extensive comments on NPR 73, including the Beer

⁷⁵ See 72 Fed. Reg. 41,873–74.

⁷⁶ See 72 Fed. Reg. at 41,873–74. The optional statement of alcohol expressed as fluid ounces could only appear in a “Serving Facts” label alongside the mandatory alcohol content statement expressed as ABV.

⁷⁷ *Id.* See also 72 Fed. Reg. 53,742 (Sept. 20, 2007) (extending the deadline to January 27, 2008).

⁷⁸ See Comments to Docket No. TTB-2007-0062, *available at* www.regulations.gov.

Institute⁷⁹, the Brewers Association,⁸⁰ the Distilled Spirits Council of the United States,⁸¹ and the Wine Institute.⁸² Several important consumer and public health groups also submitted extensive comments on NPR 73, perhaps most prominently CSPI, which has played a key role in alcoholic beverage labeling regulatory reform since the 1970s.⁸³ In reviewing the comments submitted by these groups and others, it is evident that there are several central controversies regarding NPR 73, which can be generally classified into three groups: (1) whether further disclosure on alcohol content and nutritional information is necessary or even useful (and, relatedly, if a standard label is created, whether it should be mandatory or voluntary); (2) the content and form of the disclosure; and (3) whether there should be a small producer exemption.⁸⁴ This section summarizes the debate on those three issues, as illustrated by the public comments submitted by the organizations mentioned above.⁸⁵

⁷⁹ The Beer Institute is a national trade association representing domestic and international brewers that produce over 90 percent of the beer consumed in the United States. *See* Beer Institute Comment on NPR 73 at 1 (Jan. 28, 2008).

⁸⁰ The Brewers Association represents approximately 1,400 small brewers located in all 50 states, and membership is limited to brewers producing less than two million barrels of beer per year. *See* Brewers association Comment on NPR 73 at 2 (Jan. 25, 2008).

⁸¹ The Distilled Spirits Council of the United States is a national trade association representing producers and marketers of distilled spirits and importers of wines sold in the U.S. *See* Distilled Spirits Council of the United States' Comment on NPR 73 at 1 (Jan. 27, 2008).

⁸² The Wine Institute is "the voice for California wine," representing 1,000 wineries and affiliated business throughout California, America's largest wine producing region. *See* "About the Wine Institute," *available at* <http://www.wineinstitute.org/company>.

⁸³ CSPI is a nonprofit health advocacy group that focuses on nutrition, food safety, and pro-health alcohol policies. CSPI has been involved in regulatory efforts to improve alcohol beverage labels since 1972, when it first petitioned BATF to require ingredient labeling on alcohol beverages. CSPI Comment on NPR 73 at 1 (Jan. 22, 2008).

⁸⁴ For an interesting general critique of NPR 73, *see* Simas, *supra* note 28.

i. Need for Nutritional and Alcohol Content Disclosure

Among the groups mentioned above, the strongest advocate of additional disclosure on alcohol and nutritional content for alcoholic beverages was CSPI. To varying degrees, the beer, spirits and wine trade groups supported certain additional disclosures, but their comments were much more cautionary, sometimes questioning TTB's principal assumptions and certainly emphasizing the burdens on alcoholic beverage manufacturers that would result from the new label regulations.

CSPI's public comment on NPR 73 reflected its broad support for additional alcoholic beverage label disclosures, but suggested that TTB's proposal did not go far enough. CSPI considered it an "oddity" that there is a well-established governmental standard of "moderate" or "low-risk" drinking, but that alcoholic beverages do not necessarily contain the information that consumers need to moderate their drinking.⁸⁶ CSPI cited several specific areas where NPR 73 came up short. First, CSPI faulted NPR 73 for not proposing ingredient labeling.⁸⁷ Second, it suggested that alcohol content should be required to be placed on the Serving Facts label, rather than anywhere on the bottle, as proposed by TTB.⁸⁸ Finally, CSPI was critical of NPR 73 for not requiring a statement that U.S. Dietary Guidelines advise no more than two drinks per day for men or one drink per day for women (a "moderate drinking" statement).⁸⁹

⁸⁵ Of course, this is not an exhaustive list of the controversies surrounding NPR 73. The discussion here merely aims to summarize *some* of what appear to be the most important questions facing the TTB in determining a final rule on the matter.

⁸⁶ CSPI Comment at 1.

⁸⁷ *Id.* at 2.

⁸⁸ *Id.* at 3.

⁸⁹ *Id.* at 5.

The Beer Institute agreed with TTB that information about calorie, carbohydrate, fat and protein content is useful to consumers.⁹⁰ Interestingly, the Beer Institute emphasized that TTB has required that information to appear on a statement of average analysis on “light” beer labels since 1976, and that over half the beer sold in the U.S. is “light beer.”⁹¹ This suggests that at least half of the beer sold in the U.S. *already discloses* the nutritional content proposed to be required by NPR 73. However, the Beer Institute cast doubt on one of TTB’s stated purposes in requiring alcohol content disclosure—to help “consumers make responsible drinking decisions.”⁹² In particular, the Beer Institute argued that the mandatory Government Warning already communicated the risks of alcohol consumption, and that the risks of over-consumption are, in any event, generally well-known.⁹³

The Wine Institute emphasized that additional information should be *voluntary*, not mandatory.⁹⁴ The Wine Institute argued that wine consumers rarely inquire into nutritional information for wine, thereby rebutting TTB’s statement in NPR 73 that “calorie and nutrient content of alcoholic beverages may constitute a material factor in a consumer’s decision to purchase such beverages, and that under the FAA Act and as supported by its legislative history it is appropriate to require that labels present this data

⁹⁰ Beer Institute Comment at 1.

⁹¹ *Id.* at 1, 12.

⁹² 72 Fed. Reg. 41,865 (“We agree with those commenters who suggested that providing consumers with more information about alcohol content may help them make responsible drinking decisions.”).

⁹³ Beer Institute Comment at 29.

⁹⁴ Wine Institute Comment at 3.

for the consumer’s consideration.”⁹⁵ The Wine Institute also questioned the effectiveness of mandatory labeling in accomplishing stated public health goals, pointing to the failure of “Nutrition Facts” labels to prevent a dramatic increase in obesity rates since 1990, when those labels began to be required.⁹⁶

Finally, the Wine Institute argued that TTB lacks statutory authority in the FAA Act to require alcohol content disclosure on wines between 7% and 14% ABV. Specifically, it pointed to a provision of the FAA Act that states: “statements of alcoholic content shall be required only for wines containing more than 14 per centum of alcohol by volume.”⁹⁷ Arguably, however, this statutory text is ambiguous, hinging on the meaning of the phrase “shall be required only for.” One could also read the statute to say that TTB *must* require alcohol content disclosure for wines stronger than 14% ABV, but *may* require alcohol content disclosure for wines weaker than 14% ABV.

The Distilled Spirits Council, speaking for an industry whose beverages are already required to disclose alcohol content, “fully support[ed] and applaud[ed] the Bureau’s proposal to require the disclosure of the alcohol content for all malt beverages and wines with a 7% to 14% ABV.”⁹⁸ The Distilled Spirits Council did not comment, however, on the advisability of requiring calorie, carbohydrate, fat, and protein content to appear on the proposed “Serving Facts” label.

ii. Form of the Disclosure

a. Defining a “Standard Drink”

⁹⁵ *Id.* at 3 (quoting 72 Fed. Reg. 41,668).

⁹⁶ *Id.* at 2.

⁹⁷ *Id.* at 5 (citing 27 U.S.C. § 205(e)(2)).

⁹⁸ Distilled Spirits Council Comment at 2.

In NPR 73, TTB rejected the idea of defining a “standard drink.” Instead, the TTB opted to set various “reference serving sizes” for malt beverages, wines, and distilled spirits (varying to some degree on the alcohol concentration of different varieties, e.g. reference serving sizes of 12 fluid ounces for malt beverages weaker than 10% ABV and of 5 fluid ounces for malt beverages 10% ABV or stronger).⁹⁹ TTB rejected the standard drink concept at least in part because it found that alcoholic beverages are customarily consumed in different manners (i.e. pint glasses, flutes, shot glasses, martini glasses, etc.).¹⁰⁰ It is somewhat unclear, however, why this rationale for rejecting the idea of a “standard drink” did not also apply to TTB’s concept of “reference serving sizes.” And, to be sure, there were very strong differences of opinion among the various industry and consumer groups with respect to “reference serving sizes” and “standard drinks.”

The Beer Institute did not support either the concept of a “standard drink” definition or the TTB’s proposal of reference serving sizes.¹⁰¹ The Beer Institute noted that the reference serving sizes suggested for beer, wine, and distilled spirits are at odds with what consumers actually pour and consume.¹⁰² The Beer Institute advocated a “reference amount” for beer, liquor and wine based on “actual consumption patterns”¹⁰³ (instead of TTB’s proposed reference serving sizes of a 12 oz beer, a 5 oz wine, and a 1.5

⁹⁹ See note 74, *supra* (describing TTB’s proposal on “reference serving sizes” in more detail).

¹⁰⁰ 72 Fed. Reg. 41, 871.

¹⁰¹ Beer Institute Comment at 2.

¹⁰² *Id.* at 2.

¹⁰³ The Beer Institute’s Comment proposed basing actual consumption patterns on a NIAAA/Census Bureau Survey, the results of which are too lengthy to describe here. See Beer Institute Comment at 25.

spirit).¹⁰⁴ In support of its argument that the “standard drink” and “reference serving size” proposals would confuse consumers and are at odds with consumer behavior, the Beer Institute hired a firm to conduct consumer research.¹⁰⁵ That research showed that most wine and liquor drinkers customarily poured more than the 5 oz and 1.5 oz reference serving sizes proposed for wine and liquor.¹⁰⁶ The Beer Institute also noted that only five percent of drinkers surveyed completely understood the “standard drink” concept, with most participants not understanding that the standard drink concept depends entirely on the alcohol content of specific beverages, and thus, a standard drink size for beer, for example, would not apply to *all varieties* of beer.¹⁰⁷

The Distilled Spirits Council supported the idea of defining a standard drink, and it suggested amending the proposed Serving Facts label by (1) defining, without regard to alcohol content, serving sizes of 1.5 fluid ounces for spirits, 12 fluid ounces for beer, and 5 fluid ounces for wine, (2) requiring the amount of alcohol in fluid ounces per serving and (3) requiring a statement that indicates that a “standard drink contains .6 fluid ounces of alcohol.”¹⁰⁸ To support the serving sizes for spirits, beer and wine, the Distilled Spirits Council cited TTB’s Ruling 2004-1, which used those serving sizes, and it also argued that those sizes are familiar in the marketplace.¹⁰⁹

¹⁰⁴ Beer Institute Comment at 25.

¹⁰⁵ *Id.* at 19.

¹⁰⁶ *Id.* at 19.

¹⁰⁷ *Id.* at 19.

¹⁰⁸ Distilled Spirits Council Comment at 2.

¹⁰⁹ TTB Ruling 2004-1.

CSPI did not oppose the idea of defining a “standard drink” in terms of alcohol content, but suggested that drinks which are considerably stronger than the standard drink (for example, a 12 ounce beer with 10% ABV, twice the standard 5% ABV) should have to clearly disclose that they contain “twice” the alcohol of a “standard” drink.¹¹⁰

b. Alcohol Content Disclosure in U.S. Fluid Ounces

In NPR 73, TTB found that it would be “very rare[]” that a glass of beer, wine or spirit would contain exactly .6 fluid ounces of alcohol, and concluded that the best way to express alcohol content on a product label would be by percentage of alcohol by volume.¹¹¹ The ABV-form, after all, is the form that TTB currently requires for distilled spirits, flavored malt beverages, and wines stronger than 14% ABV.¹¹² TTB also noted that consumers “have little or no familiarity with alcohol expressed in U.S. fluid ounces of pure alcohol.”¹¹³ Despite this statement, TTB did propose allowing an *optional* statement of alcohol content expressed in U.S. fluid ounces per serving—in addition to the *mandatory* ABV alcohol content disclosure.¹¹⁴

The Beer Institute opposed the optional disclosure of fluid ounces of alcohol, stating that it would be likely to mislead consumers.¹¹⁵ Furthermore, The Beer Institute argued that a disclosure of alcohol by fluid ounces would appear to conflict with some state regulations which require that alcohol content be shown as ABV, as well as more

¹¹⁰ CSPI Comment at 4–5.

¹¹¹ 72 Fed. Reg. 41,871 and 41,866.

¹¹² See notes 32–48, *supra*.

¹¹³ 72 Fed. Reg. 41,866.

¹¹⁴ See note 76, *supra*.

¹¹⁵ Beer Institute Comment at 2.

general provisions of state law that prohibit misleading product claims.¹¹⁶ The Beer Institute pointed out that disclosure by ABV is already required for flavored malt beverages and liquor as well as wines stronger than 14% ABV, and that introduction of a different measure would make it more difficult to compare alcoholic beverages with each other.¹¹⁷ The Wine Institute also opposed the optional disclosure of the amount of alcohol, in fluid ounces, arguing that it was redundant and would tend to confuse consumers.¹¹⁸ CSPI shared these sentiments, arguing that an additional, optional disclosure of alcohol by fluid ounces would be confusing to consumers, and that it would cut against the goal of uniformity and consistency across all alcoholic beverages.¹¹⁹

The Distilled Spirits Council was essentially alone among the major industry groups in its support for requiring the amount of pure alcohol, in fluid ounces, contained in a serving, which one could then compare to the fluid ounces of alcohol in a “standard drink” (which it claims is .6 fluid ounces).¹²⁰ Its support for disclosure of pure alcohol in fluid ounces, however, dovetailed with its views on the definition of a “Standard Drink” as described above.

iii. Small Producer Exception

NPR 73 stated TTB’s view that the proposed rule would *not* have a “significant economic impact on a substantial number of small entities.”¹²¹ Accordingly, the TTB

¹¹⁶ *Id.* at 8.

¹¹⁷ *Id.* at 10.

¹¹⁸ Wine Institute Comment at 21.

¹¹⁹ CSPI Comment at 3.

¹²⁰ Distilled Spirits Council Comment at 4.

¹²¹ 72 Fed Reg. 41,875.

concluded that a regulatory flexibility analysis was not required under the provisions of the Regulatory Flexibility Act, 5 U.S.C. 601.¹²² TTB rejected the idea of a small business exemption, explaining that “it might be inconsistent with our mandate to ensure that alcohol beverage labels provide consumers with adequate information about the identity and quality of these products.”¹²³ To mitigate the costs to industry, TTB instead proposed a three year phase-in of the proposed labeling requirements, as well as allowing flexibility on the placement and appearance of the label (specifically, allowing a linear display instead of a panel).¹²⁴ TTB’s position on a small business exemption is somewhat at odds with the federal regulatory approach to Nutrition Facts labels, which are subject to a small business exemption.¹²⁵ Certainly, the impact of NPR 73 on small producers was a large concern of several of the industry groups, especially the Brewers Association and the Wine Institute.

The Wine Institute predicted that, using TTB’s estimate of \$250 per sample for nutritional and alcohol content testing, for a winery performing 500 pre-bottling analysis per year,¹²⁶ the additional annual costs associated with mandatory labeling would be \$125,000.¹²⁷ The Wine Institute advocated a “Typical Values” approach—which it said

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ See 21 C.F.R. § 101.9(j); see also FDA Industry Guidance, Small Business Nutrition Labeling Exemption Guidance (May 7, 2007).

¹²⁶ The Wine Institute also argued that the wine industry would be relatively more burdened by nutritional and alcohol content testing, compared to the beer and distilled spirits industries, because “wine is inherently variable in composition.” Wine Institute Comment at 8.

¹²⁷ Wine Institute Comment at 7.

would closely correlate to actual pre-bottling analyses—to mitigate the cost to producers that would be caused by NPR 73.¹²⁸

Similarly, The Brewers Association emphasized the heavy costs that would be incurred by small breweries in meeting the proposed labeling requirements.¹²⁹ As an initial matter, the Brewers Association cast doubt on TTB’s assumed cost of \$250 per lab testing.¹³⁰ The Brewers Association predicted that, based on its market research, almost 40 percent of brewers producing under 1,000 barrels would cease bottling operations if a serving facts label were required.¹³¹ Even for small brewers producing over 100,000 barrels, the expected cost of compliance would be approximately \$350,000 per year.¹³² Finally, the Brewers Association noted that small batch brews, including seasonal brews and special occasion beers, may be reduced as a result of the labeling requirements.¹³³ As a way of mitigating the burden on small breweries, the Brewers Association proposed widening the allowed margin of error for alcohol, calorie, carbohydrate, fat, and protein content.¹³⁴

3. Renewed Calls for TTB to Issue a Final Rule and Challenges Posed By the 2010 Healthcare Reform

¹²⁸ *Id.* at 9–12.

¹²⁹ Brewers Association Comment at 3. Because the Brewers association represents small breweries it makes sense that it would be especially sensitive to a small producer exemption. Small brewers would be hurt in other ways by NPR 73. *See, e.g.*, THE WASHINGTON POST, June 30, 2010; Michelle Locke, *Alcohol by the numbers: Some in the industry want nutrition labels on bottles*, ASSOCIATED PRESS, Jan. 19, 2011.

¹³⁰ Brewers Association Comment at 12–13.

¹³¹ *Id.* at 12.

¹³² *Id.* at 12–13.

¹³³ *Id.* at 15.

¹³⁴ *Id.* at 4.

Over the past several years, there have been renewed calls for the TTB to issue a final rule regarding alcoholic beverage labels.¹³⁵ Some groups have expressed frustration with TTB's delay in issuing a final rule.¹³⁶ It remains unclear if and when TTB will issue a final rule, but the healthcare reform that passed in March of 2010 ("the Affordable Care Act")¹³⁷ certainly did not simplify TTB's task. Specifically, Section 4205 of the Affordable Care Act requires that certain chain retail food establishments provide caloric and other nutritional information for menu items, food on display, and self-service food.¹³⁸ This provision raised the question of whether alcoholic beverages would be subject to the Affordable Care Act's menu labeling requirement.

FDA is charged with issuing regulations to put Section 4205 into effect, and it has issued several Draft Guidances on the matter.¹³⁹ In an initial Draft Guidance on Section 4205, FDA stated that Section 4205 *would apply to alcoholic beverages* because alcoholic beverages are considered "food" under the Food, Drug and Cosmetics Act, "even though [alcoholic beverages] may be regulated by other agencies in other

¹³⁵ See, e.g., *Diageo Marks Sixth Anniversary of Petition to Allow Serving Facts on Its Bottles*, BIOTECH WEEK, Dec. 30, 2009; *Distilled Spirits Council Urges Government Support for Standard Drink Information on Alcohol Labels*, TARGETED NEWS SERVICE, April 22, 2010; Greg Kitsock, *Who cares about calories?*, THE WASHINGTON POST, June 30, 2010.

¹³⁶ For example, George Hacker, the Director of Alcohol Policies Project at the CSPI, was quoted in a 2009 article as saying "TTB has more than earned a new name: 'The Take our Time Bureau.'" *National Consumers League; Consumer / Health Groups Again Call for Meaningful Change in How Treasury Department Regulates Alcohol Labeling*, MENTAL HEALTH WEEKLY DIGEST, December 28, 2009.

¹³⁷ See Patient Protection and Affordable Care Act of 2010, Pub. L. 111-148, 124 Stat. 119 (2010).

¹³⁸ *Id.* § 4205; see also Stephanie Rosenbloom, *Calorie Data to Be Posted at Most Chains*, THE NEW YORK TIMES, March 23, 2010.

¹³⁹ FDA Guidance for Industry: Questions and Answers Regarding Implementation of the Menu Labeling Provisions of Section 4205 of the Patient Protection and Affordable Care Act of 2010 (August 2010), available at <http://www.fda.gov/food/guidancecomplianceregulatoryinformation/guidancedocuments/foodlabelingnutrition/ucm223408.htm>.

circumstances.”¹⁴⁰ TTB submitted a public letter to the FDA in response to this Draft Guidance, reminding the FDA that “TTB is responsible for the promulgation and enforcement of regulations with respect to the labeling and advertising [of alcoholic beverages]” and that “as FDA proceeds in the implementation of the new menu labeling requirements, [TTB] suggests that TTB and FDA continue to work together to ensure that the requirements of the two agencies do not inconsistently impact alcohol beverage container labels that are subject to TTB’s exclusive labeling jurisdiction under the FAA Act.”¹⁴¹ FDA has now withdrawn its initial Draft Guidance,¹⁴² but it has not commented further on the applicability of Section 4205 to alcoholic beverages, nor has it commented on FDA-TTB coordination in implementing Section 4205.¹⁴³

II. Concurrent State-Federal Regulation of Alcoholic Beverage Labels

This section explores the balance of state and federal authority with respect to alcoholic beverage labeling and how NPR 73 fits into that equation.¹⁴⁴ It discusses several specific examples to illustrate the state-federal balance of regulatory authority, highlighting variations in state law concerning alcohol content disclosure, as well as

¹⁴⁰ FDA Draft Guidance for Industry (Withdrawn), Questions and Answers Regarding Implementation of the Menu Labeling Provisions of Section 4205 of the Patient Protection and Affordable Care Act of 2010 (August 2010), available at <http://www.fda.gov/Food/GuidanceComplianceRegulatoryInformation/GuidanceDocuments/FoodLabelingNutrition/ucm223266.htm>.

¹⁴¹ TTB Comment on FDA Draft Guidance on Section 4205 of Affordable Care Act (Oct. 7, 2010).

¹⁴² See note 140, *supra*.

¹⁴³ The renewed need for FDA-TTB coordination with respect to nutritional and alcohol content labeling on alcoholic beverage has been emphasized by industry groups. See, e.g., Comment of the Brewers Association on FDA Draft Guidance on Section 4205 of Affordable Care Act (Oct. 12, 2010) (“The BA respectfully urges the FDA to revise its final guidance to indicate that application of the Affordable Care Act to alcohol beverages will occur when FDA and TTB officials agree on a consistent implementation methodology. . . . Basic concepts of good government and fairness to a heavily-regulated industry should guide the FDA in this situation.”).

¹⁴⁴ In this section, I assume that NPR 73 represents the final rule. Hence, the example Serving Facts label presented on page 15, *supra*, is the label that I assume will be required.

examples of overlapping state and federal authority with respect to various aspects of alcoholic beverage labels. Finally, this section considers to what extent a federally mandated label like the one proposed in NPR 73 may pre-empt state label regulations. Unfortunately, there is relatively sparse case law on the subject, but the section concludes by discussing, at some length, *Bronco Wine Co. v. Jolly*, a 2004 California Supreme Court opinion exploring the extent to which TTB label regulations may pre-empt state label regulations.

A. Specific Examples Illustrating the Federal-State Balance of Authority

1. Text of FAA Act and TTB Regulations

There is no question that alcoholic beverage producers must comply with *both* state and federal alcoholic beverage label laws and regulations. In fact, the FAA Act itself explicitly contemplates continuing state regulation of alcoholic beverage labeling.¹⁴⁵ Moreover, TTB regulations very clearly allow concurrent state regulations with respect to alcoholic beverage labeling.¹⁴⁶ This federal regulatory approach can be contrasted to The Nutrition Labeling and Education Act of 1990, which expressly pre-empts certain state

¹⁴⁵ See FAA Act at § 205(e) (prohibiting statements of alcohol content to appear on malt beverages “unless required by State law”) (note that this provision of the FAA Act was overturned by the U.S. Supreme Court on freedom of speech grounds, *see* note 34, *supra*); *see also* FAA Act at § 205(e) (“It shall be unlawful for any person to alter, mutilate, destroy, obliterate, or remove any mark, brand, or label upon distilled spirits, wine, or malt beverages held for sale in interstate or foreign commerce or after shipment therein, except as authorized by Federal law or except pursuant to regulations of the Secretary of the Treasury authorizing relabeling *for purposes of compliance with the requirements of this subsection or of State law.*”) (emphasis added).

¹⁴⁶ *See, e.g.*, 27 C.F.R. § 7.28 (“*Unless otherwise required by State law*, the statement of alcoholic content shall be in script, type, or printing”) (emphasis added); *Id.* at § 7.29 (“Labels shall not contain any statements, designs, or devices, whether in the form of numerals, letters, characters, figures, or otherwise, which are likely to be considered as statements of alcoholic content, *unless required by State law*, or as permitted by §7.71.”) (emphasis added); *Id.* at § 7.71 (“Alcoholic content and the percentage and quantity of the original gravity or extract may be stated on a label *unless prohibited by State law*. When alcoholic content is stated, *and the manner of statement is not required under State law*, it shall be stated as prescribed in paragraph (b) of this section.”) (emphasis added).

laws by stating that “no State or political subdivision of a State may directly or indirectly establish under any authority . . . any requirement for nutrition labeling of food that is not identical to the requirement of [§343(q)], except a requirement for nutrition labeling of food which is exempt.”¹⁴⁷

In fact, the only instance of “express” federal pre-emption of state alcoholic beverage labeling regulation is found in the Alcoholic Beverage Labeling Act of 1988, which has required a Government Warning to appear on alcoholic beverages since 1989.¹⁴⁸ The Government Warning expressly pre-empts any state law that requires a statement relating to alcoholic beverages and health.¹⁴⁹ BATF implemented regulations reiterating the pre-emptive effect of the Government Warning.¹⁵⁰

Even with respect to the Government Warning, however, TTB has explained that other health claims are still permitted by state legislation and regulation. Specifically, in March 2003, TTB explained that although the ABLA “preempts State governments from each requiring their own version of a health warning statement on alcohol beverage containers . . . *it in no way precludes* producers from voluntarily placing either additional warning statements or health claims on alcohol beverage labels.”¹⁵¹

¹⁴⁷ 21 U.S.C. § 343-1(a)(4) (1990). For an excellent account of the pre-emptive effect of the Nutrition Labeling and Education Act of 1990 in the context of New York City’s recent menu labeling law, see Brent Bernell, *The History and Impact of the New York City Menu Labeling Law*, 65 FOOD & DRUG L.J. 839, 849–52 (2010).

¹⁴⁸ 27 U.S.C. §§ 213–219(a).

¹⁴⁹ 27 U.S.C. § 216 (“No statement relating to alcoholic beverages and health, other than the statement required by section 215 of this title, shall be required under State law to be placed on any container of an alcoholic beverage . . .”).

¹⁵⁰ 27 C.F.R. § 16.32.

¹⁵¹ Health Claims and Other Health-Related Statements in the Labeling and Advertising of Alcohol Beverages, 68 Fed. Reg. 10,076 (emphasis added).

Furthermore, NPR 73's proposed amendments to TTB's malt beverage regulations would require alcohol content disclosure on the label *unless prohibited by state law*.¹⁵² Interestingly, this language differs from existing TTB regulations requiring alcohol content to appear on distilled spirits labels¹⁵³ and wine labels for wines stronger than 14% ABV.¹⁵⁴ For both wine stronger than 14% ABV and distilled spirits, TTB regulations do not include an "unless prohibited by state law" clause.¹⁵⁵ The effect of the proposed state law exemption for malt beverages is somewhat unclear, however, given *Rubin v. Coors Brewing Co.*, in which the U.S. Supreme Court held that a provision of the FAA Act that prohibited alcohol content to appear on malt beverages violated the First Amendment to the United States Constitution.¹⁵⁶ Regardless, TTB's inclusion of the language "unless prohibited by state law" in NPR 73 is at least some evidence that, even assuming that TTB were to issue a final rule regarding a standard federal label, TTB continues to envision state regulation of alcoholic beverage labeling, including with respect to alcohol content disclosure.

2. State Labeling Laws

Some state laws require disclosure of alcohol content on beverage labels, even where TTB regulations do not require that disclosure. For example, Oregon requires malt

¹⁵² 72 Fed. Reg. 41,859, 41,882 (proposing amendment to 27 C.F.R. § 7.71 to state the following: "General. Alcohol content must be stated on the label *unless prohibited by State law*. When alcohol content is stated, and the manner of statement is not required under State law, it shall be stated as prescribed in paragraph (b) of this section.") (emphasis added).

¹⁵³ See 27 C.F.R. § 5.32 and § 5.37 (mandating alcohol content disclosure for distilled spirits, without qualification for state law requirements).

¹⁵⁴ See 27 C.F.R. § 4.32 and § 4.36 (mandating alcohol content disclosure for wine stronger than 14% ABV, without qualification for state law requirements).

¹⁵⁵ *Id.*

¹⁵⁶ See note 34, *supra*.

beverages stronger than 6% ABV to state alcohol content on the label.¹⁵⁷ The laws in Mississippi go even further, making it *illegal* to even sell beer stronger than 5% ABV.¹⁵⁸ Certainly, one could argue that the greater power—to categorically ban alcoholic beverages above a particular ABV—includes the lesser power regarding labeling. Also, many states have passed their own laws regarding “appellations of origin” for wines, despite the fact that TTB extensively regulates the use of such references.¹⁵⁹ As another example, many states enforce their own “indecent” standards for alcoholic beverage labels, even though TTB’s labeling regulations prohibit “[a]ny statement, design, device, or representation which is obscene or indecent.”¹⁶⁰ So, even if a COLA is issued for a particular label by TTB (implying that the label meets TTB indecency screen), the label may still fail state-level indecency laws.¹⁶¹

In several reported cases, a producer had received a COLA from TTB for its label (implying compliance with TTB regulations), but was rejected by state authorities for not complying with analogous state label regulations. For example, in *Integrated Beverage Group Ltd. v. New York State Liquor Authority*, TTB issued a COLA for an alcoholic beverage intended to be consumed frozen (called “Freaky Ice”), but the New York State Liquor Authority found that the label did not comply with New York’s prohibition on

¹⁵⁷ See Oregon Revised Statutes § 471.448 (prohibiting a label from calling a malt beverage “beer” if it contains more than 6% ABV); see also Oregon Administrative Rules § 845-010-0205 (“All malt beverages exceeding six percent alcohol by volume must show in conspicuous type on the label or container the alcoholic content by volume within a tolerance not to exceed five-tenths of one percent.”).

¹⁵⁸ See MISSISSIPPI CODE OF 1972 § 67-3-1. Mississippi’s limit of 5% ABV is the lowest in the nation, see *Bill to raise beer content in Miss. Contentious*, ASSOCIATED PRESS, Jan. 20, 2011.

¹⁵⁹ See discussion, *infra*, of *Bronco Wine Co. v. Jolly*, 95 P.3d 422 (Cal. 2004).

¹⁶⁰ See, e.g., § 7.29(a)(3) (TTB regulations regarding malt beverages).

¹⁶¹ See, e.g., Texas Alcoholic Beverage Commission Code § 45.18(a)(3) (prohibiting “[a]ny statement, design, device, or representation which is obscene or indecent”).

misleading labeling practices because it could be confused for a non-alcoholic frozen treat, especially by children.¹⁶² The producer challenged the Liquor Authority's finding, but the New York courts held that the Liquor Authority appropriately exercised its authority in disallowing the label.¹⁶³ Thus, even though TTB apparently did not view the label to be misleading, the state liquor authority's contrary finding was dispositive.

3. Twenty-First Amendment to the U.S. Constitution

Another key element of the federal-state balance regarding alcoholic beverage labeling is the Twenty-First Amendment to the U.S. Constitution. Specifically, Section 2 of the Twenty-First Amendment states, "The transportation or importation into any State, . . . for delivery or use therein of intoxicating liquors, *in violation of the laws thereof*, is hereby prohibited."¹⁶⁴ Yet, despite the Twenty-First Amendment's specific allowance for compliance with state law, the Supreme Court has explained that "[n]otwithstanding the [Twenty-First] Amendment's broad grant of power to the States, . . . the Federal Government plainly retains authority under the Commerce Clause to regulate even interstate commerce in liquor."¹⁶⁵

Simply put, as these and other examples show, there is no "bright line" between federal and state authority with respect to the regulation of alcoholic beverages.¹⁶⁶ The remainder of this section will address the pre-emption issue, in light of this somewhat

¹⁶² 807 N.Y.S.2d 74, 78 (2006).

¹⁶³ *Id.* ("In sum, we have no basis in this case to interfere with the SLA's appropriate exercise of its discretion to disapprove the proposed "Freaky Ice" labels so as to prevent the product's being confused with non-alcoholic ice treats favored by children.").

¹⁶⁴ U.S. CONST. amend. XXI, § 2 (emphasis added).

¹⁶⁵ *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 713; *see also* *North Dakota v. United States*, 495 U.S. 423, 432 (1990) (federal and state interests must be weighed even when federal regulation falls within core of the state's power under the Twenty-first Amendment).

¹⁶⁶ *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980).

hazy division of regulatory authority between the federal and state governments, by discussing *Bronco Wine Co. v. Jolly*, an interesting 2004 California Supreme Court case addressing federal pre-emption of state alcoholic beverage labeling regulation.

B. *Bronco Wine Co. v. Jolly*

Perhaps the leading case on the extent to which TTB regulations may pre-empt state label regulations¹⁶⁷ is *Bronco Wine Co. v. Jolly*, in which the California Supreme Court addressed whether a California law regarding appellations of origin¹⁶⁸ was pre-empted by TTB regulations regarding American Viticultural Areas (“AVAs”).¹⁶⁹ AVAs are delimited grape growing areas with distinguishable features, the boundary of which has been approved and established by TTB.¹⁷⁰ To use an AVA on a wine label, TTB regulations generally require that 85% of wine be made from grapes grown within that AVA.¹⁷¹ And, under TTB regulations, brand names that include *references* to AVAs must only be used on wines eligible to be labeled with that particular AVA, unless the brand name was “grandfathered” (meaning that the COLA for that brand name was approved before July 7, 1986).¹⁷²

¹⁶⁷ The Supremacy Clause of the U.S. Constitution gives Congress the authority to pre-empt any state law that conflicts with the exercise of federal power. U.S. CONST. art. VI, cl. 2.; *see also* *Mango Bottling, Inc. v. Texas Alcoholic Bev. Commission*, 973 S.W.2d 441, 445–45 (Tex. App.—Austin 1998) (Texas law regarding container size not pre-empted by TTB regulation on container size because, among other reasons, it did not pose an obstacle to any purpose underlying the federal administrative regime).

¹⁶⁸ An appellation of origin can be a country, a state (or several states), a county (or several counties), or a defined viticultural area. *See* 27 C.F.R. § 4.25.

¹⁶⁹ 95 P.3d 422 (Cal. 2004).

¹⁷⁰ *See* 27 C.F.R. § 4.25(e)(1)(i).

¹⁷¹ *See* 27 C.F.R. § 4.25(e)(3)(ii).

¹⁷² *See* 27 C.F.R. § 4.39(i).

In *Bronco*, a winemaker possessed a number of “grandfathered” wine labels that it had acquired from a third party.¹⁷³ These labels included references to AVAs, such as “Napa Ridge” and “Napa Creek Winery.”¹⁷⁴ Notably, the winemaker used these “Napa” designations on wines made from grapes entirely outside of Napa County.¹⁷⁵ Normally, this would have violated the TTB regulations described above, but because the COLAs for these “Napa” brands were issued before July 7, 1986, they were technically in compliance with federal law due to the grandfather provision.

California, however, had a state law that went further than the TTB regulations in protecting the “Napa” name, reaching even the “grandfathered” labels exempted by TTB regulations. Specifically, a provision of the California Business and Professions Code provided that no wine produced or marketed in California shall use a brand name or have a label bearing the word “Napa” (or any federally recognized viticultural area within Napa County) unless at least 75 percent of the grapes from which the wine was made was grown in Napa County.¹⁷⁶ The legislative history of the California law reflected the view among state legislators that “Napa Valley and Napa County have been widely recognized for producing grapes and wine of the highest quality” and that “certain producers [were] using Napa appellations on labels . . . for wines that are not made from grapes grown in Napa County, and that consumers are confused and deceived by these practices.”¹⁷⁷ The California law was meant to eliminate these “misleading practices.”¹⁷⁸

¹⁷³ 95 P.3d at 425.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 426 (citing CAL. BUS. & PROF. CODE § 25241).

In sum, the “Napa” labels on wine produced from grapes entirely outside of Napa County *complied* with TTB regulations (due to the grandfather provision) but *fell short of* California regulations (which had no grandfather provision). The winemaker sued to prevent California from enforcing its law, arguing, among other things, that the more restrictive state law was pre-empted by the TTB regulations.¹⁷⁹ This section proceeds by exploring how the California Supreme Court analyzed this pre-emption argument.

As an initial matter, the Court explained that, generally speaking, there are four types of pre-emption: (1) express pre-emption,¹⁸⁰ (2) field pre-emption,¹⁸¹ (3) conflict pre-emption (where compliance with both federal and state laws is an impossibility),¹⁸² and (4) where the state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”¹⁸³ One should note that the Court’s fourth category of pre-emption is often considered a subset of the third category, “conflict pre-emption.”¹⁸⁴

Turning to the facts of the case before it, the Court found that Congress had not “expressly” pre-empted state regulation of wine generally, or with respect to wine

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 427–28. The winemaker also claimed that the California law violated the First Amendment, the Commerce Clause, and the Takings Clause of the United States Constitution. *Id.*

¹⁸⁰ *Id.* at 428 (citing *Jones v. Rath Packing Co.*, 430 U.S. 519 (1970)).

¹⁸¹ *Id.* (citing *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

¹⁸² *Id.* (citing *Florida Avocado Growers v. Paul*, 373 U.S. 132, 142–43 (1963)).

¹⁸³ *Id.* (citing, among other cases, *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

¹⁸⁴ *See, e.g., Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 98 (1992).

labels.¹⁸⁵ The Court also explained that the winemaker had not pled “field pre-emption,” and that “conflict pre-emption” was not an issue because compliance with both the state and federal laws was technically possible.¹⁸⁶ Thus, the Court was left to analyze whether the California law “[stood] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”¹⁸⁷

The Court’s next step was to address the winemaker’s argument that the traditional presumption against pre-emption¹⁸⁸ should not apply to California’s labeling law, because, according to the winemaker, “there [was] no evidence that states traditionally have exercised their police powers to regulate the labeling of wine.”¹⁸⁹ If the presumption against pre-emption were upheld, the winemaker would have to show that pre-emption was the “clear and manifest purpose of Congress.”¹⁹⁰ The Court agreed that the test with respect to the presumption against pre-emption was whether labeling regulation was *traditionally a state role*.¹⁹¹ To answer that question, the Court engaged in a lengthy analysis of the historical balance between state and federal power with respect

¹⁸⁵ 95 P.3d. at 428.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ The Supreme Court has explained that in a pre-emption analysis, a court must “start with the assumption that the historic police powers of the States [are] not to be superseded by [a] Federal Act unless that was the clear and manifest purpose of Congress.” *United States v. Locke*, 529 U.S. 89, 107 (2000). This presumption against pre-emption is heightened where “federal law is said to bar state action *in fields of traditional state regulation*.” *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995) (emphasis added).

¹⁸⁹ 95 P.3d at 430.

¹⁹⁰ *Id.* at 429.

¹⁹¹ *Id.*

to alcoholic beverage regulation, both as a general matter, and also with respect to beverage labels specifically.¹⁹²

The Court's historical analysis was impressively thorough (too thorough to fully recount here), so just a few of its findings will be noted here. First, the Court explained that many states had enacted "pure food" laws well before the 1906 Act, and that these laws reached the mislabeling of alcoholic beverages.¹⁹³ Indeed, the Court pointed to specific wine label laws in California, New York, and Ohio, dating to 1887, that prohibited misleading labeling and established standard of identity (e.g. that any beverage labeled "pure wine" must include only grapes).¹⁹⁴ Second, the Court pointed out that nothing in the 1906 Act implied that the existing state regulation of the misbranding of food and beverages was to be pre-empted, and in fact the 1906 Act contemplated continuing state regulation regarding misbranding.¹⁹⁵ Third, the Court emphasized that the first enforceable federal regulations regarding wine labels were not promulgated until 1935 (under the FAA Act), and by that point, many states had already been enforcing their own very detailed regulations for decades.¹⁹⁶

Given this historical account of the state-federal balance with respect to alcoholic beverage labeling regulation, the Court held that when the FAA Act was passed and its implementing regulations regarding wine labels became effective in 1935, the federal law

¹⁹² *Id.* at 431–52.

¹⁹³ *Id.* at 431–34.

¹⁹⁴ *Id.* at 433–34.

¹⁹⁵ *Id.* at 438.

¹⁹⁶ *Id.* at 440.

“was legislating in a field traditionally regulated by the states.”¹⁹⁷ Therefore, the Court applied the presumption against pre-emption to the case at hand, and went on to analyze whether the winemaker could meet its resulting burden: to show that pre-emption was the “clear and manifest” purpose of federal law.¹⁹⁸

To decipher whether there was such a “clear and manifest” intent to pre-empt state regulation, the Court turned to the legislative history of the FAA Act itself. In that history, the Court found exactly the *opposite* to be the case. Among other legislative history cited by the Court were statements by the law’s author, on the floor of the House of Representatives, that clearly cut against pre-emption (e.g. his noting the need to “supplement” state regulation and noting that the states “alone cannot do the whole job”).¹⁹⁹ The Court also noted that several California laws, dating to the late 1930s, had more stringent requirements with respect to appellations of origin than federal regulations imposed.²⁰⁰ Also relevant in the Court’s analysis was the fact that TTB’s regulations regarding AVAs explicitly contemplated more stringent state regulations, making the right to label a wine with an AVA contingent on, among other things, compliance with “the laws and regulations of all of the States contained in the viticultural area.”²⁰¹

Moreover, the Court noted that TTB had historically acquiesced to more stringent state regulations regarding usage of AVAs on wines.²⁰² Finally, the Court pointed out that

¹⁹⁷ *Id.* at 441 (internal citation omitted).

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 443–44 (quoting Remarks of Rep. Cullen on H.R. No. 8539, 74th Cong., 1st Sess., 79 Cong. Rec. (1935) 11714).

²⁰⁰ *Id.* at 446.

²⁰¹ *Id.* at 447–48 (quoting 27 C.F.R. § 4.25).

the 1988 Alcoholic Beverage Labeling Act included an express pre-emption clause, which the Court viewed as unnecessary if Congress had already intended its alcoholic beverage labeling regulations to pre-empt state law.²⁰³ With all of this history, the Court found no “clear and manifest” intent to pre-empt state regulation.²⁰⁴

To complete the pre-emption analysis, the Court went on to answer the “crucial question” of “whether the state rule would stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”²⁰⁵ The Court held that the state law was “consistent with Congress's overall purpose” in enacting the labeling provisions of the FAA Act, including the goal of “insur[ing] that the purchaser should get what he thought he was getting, [and] that the representations both on labels and in advertising should be honest and straightforward and truthful.”²⁰⁶ The Court also put some weight on the fact that BATF had acquiesced to the state law, did not view the state law as being pre-empted by federal law, and also did not view the state law as posing an obstacle to the accomplishment of the full purposes and objectives of Congress.²⁰⁷ After its pre-emption arguments were rejected by the California Supreme Court, the

²⁰² *Id.* at 448–50.

²⁰³ *Id.* at 451–52 (“Indeed if Congress, as [the winemaker] asserts, by enactment of the FAA Act in 1935, already had generally preempted state regulation of wine labels, there would have been no need for any express preemption clause or preemption regulation with respect to the 1988 health warnings for wine labels.”).

²⁰⁴ *Id.* at 452.

²⁰⁵ *Id.* at 454.

²⁰⁶ *Id.* at 454 (citing, among other legislative history, Hearings before House Com. on Ways and Means on H.R. No. 8539, Fed. Alcohol Control Act, (1935), testimony of Joseph H. Choate, former Chairman of FAC Admin., 74th Cong., 1st Sess., at 10).

²⁰⁷ *Id.* at 455 (citing *Hillsborough*, 471 U.S. at 717) (because “the agency has not suggested that the county ordinances interfere with federal goals, we are reluctant in the absence of strong evidence to find a threat to the federal goal of ensuring sufficient plasma”).

winemaker's petition for writ of certiorari to the United States Supreme Court was also rejected.²⁰⁸

After the California Supreme Court ruled that the California law was not preempted by the TTB regulation, it remanded the case to a lower court to consider, among other claims, whether the state law violated the Commerce Clause of the U.S. Constitution.²⁰⁹ The appellate court rejected the Commerce Clause challenge to the California regulation on two grounds. First, the court explained that “the federal law authorizes or contemplates that California may establish *stricter* wine labeling requirements for wine destined for interstate distribution.”²¹⁰ Second, “the state's interests in protecting California wine consumers from misleading brand names of viticultural significance and in preserving and maintaining the reputation and integrity of its wine industry in out-of-state and foreign markets outweigh the indirect effect of [the California regulation] on interstate commerce.”²¹¹

Conclusion

TTB's 2007 proposal in NPR 73 to require alcohol and nutritional content on alcoholic beverage labels is the latest chapter in a long history of federal efforts to carry out the dual mandates of the FAA Act: to prevent consumer “deception” and to provide consumers with “adequate information” as to the identity and quality of alcoholic beverage products.²¹² There is an active debate, however, as to whether NPR 73 would

²⁰⁸ *Bronco Wine Co. v. Jolly*, 546 U.S. 1150 (2006) (cert. denied).

²⁰⁹ *Bronco Wine Co. v. Jolly*, 129 Cal. App. 4th 988, 998–99 (Cal. Ct. App. 2006).

²¹⁰ *Id.* at 999 (emphasis added).

²¹¹ *Id.*

²¹² 27 U.S.C. § 205(e) (1935).

actually serve those ends, as illustrated by the wide range of views in public comments on NPR 73 regarding (1) the need for additional disclosure; (2) the form of such disclosure; and (3) the possibility of a small producer exemption. Moreover, Section 4205 of the Affordable Care Act, regarding mandatory menu labeling for certain restaurants, has complicated TTB's task in issuing a final rule because it would appear to call for coordination between the FDA and TTB.

Historically, states have played a very active role in regulating alcoholic beverage labels, and there is little doubt that NPR 73, as proposed, would shift the balance of state-federal regulation away from the states. Depending on the final form of a federally mandated label, however, it is possible that some states may conclude either that (1) the federal label *does not go far enough* in providing consumers information on alcohol or nutritional content, or (2) that the federal label is *misleading* to consumers, in violation of applicable state law (for example, a state may conclude that an optional disclosure of pure alcohol in fluid ounces may confuse consumers, in violation of state law). And, if states pass laws or issue regulations "curing" what they view to be the shortcomings of a federally mandated label, potential and actual conflicts between state and federal law may lead to interesting pre-emption challenges to state law.

Unfortunately, there is little case law on the pre-emptive effect of TTB regulations over state law, but the California Supreme Court's opinion in *Bronco Wine Co. v. Jolly*, discussed at length above, illustrates one approach to such pre-emption challenges. Applying the Court's analysis in *Bronco*, one would likely conclude that where state label regulations are merely *more stringent* than federal regulations, courts are unlikely to hold that the state requirements are pre-empted by federal law, in light of

the states' historic role in regulating alcoholic beverage labels, the purposes of the FAA act, and a variety of historic examples of TTB' acquiescence to more stringent state label regulations. Similarly, if state law attempts to cure "misleading" or "deceptive" aspects of TTB regulations by *prohibiting* what TTB merely *permits* (e.g. if a final TTB rule permits disclosure of pure alcohol content in U.S. fluid ounces, which a state then prohibits because it is deemed to be "misleading" or "deceptive" under applicable state law), courts are also unlikely to find pre-emption, because, as was the case in *Bronco*, compliance with both state and federal law technically would be possible.

Yet, if state law ends up *prohibiting* disclosures on labels that the final TTB rule *requires*, thus making it impossible to comply with both state and federal law (for example, if a new state law prohibits disclosure of a "reference serving size," which disclosure is required by a final TTB regulation, on the view that the term "serving size" misleadingly suggests to consumers that they *should consume* particular volumes of alcohol as part of a healthy diet), it is uncertain how courts would analyze the pre-emption question. The question would be different than the one facing the court in *Bronco*, where compliance with both state and federal law was technically possible. Although that court's historic analysis of state-federal authority over alcoholic beverage labels would likely be given some weight in a direct conflict pre-emption analysis, the outcome of such a pre-emption challenge to state law is uncertain, and it would be very interesting to see how courts would approach the question.

That said, TTB may already be contemplating such pre-emption challenges to its final rule, and it may opt to avoid direct conflicts between federal and state law through careful drafting. Hence, if and when TTB issues a final rule "requiring" alcohol and

nutritional content disclosures on alcoholic beverages, one should pay special attention to the following qualifier: “*unless prohibited by state law.*”